REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 60 OF 2015

(CORAM: J. A. MAKAU – J.)

KELVIN OKOTH.. 1ST APPELLANT

VERSUS

REPUBLIC.. RESPONDENT

(Being an appeal against both the conviction and the sentence dated 30.7.2015 in Criminal Case No. 292 of 2014 in UKWALA Law Court before Hon R.M. OANDA – S.R.M.)

JUDGMENT

1. The Appellant **KELVIN OKOTH** , herein was the 1st accused, **COLLINS OTIENO MADARA**, the 2nd Accused, **MICHAEL OWINO SYLVESTER**, the 3rd accused, were jointly charged with one count of **Robbery With Violence Contrary to Section 296 (2) Penal Code,** whereas the 2nd accused and the 3rd accused faced separate counts of **Handling Stolen Goods.** The particulars of the **offence of Robbery with violence** are that on 25th day of May 2014 at Ugunja District within Siaya County jointly with others not before court robbed Emmily Akinyi Oduor mobile phone make Techno valued at Ksh.6,000/= cash Ksh.1000/= and white sweater valued at Ksh.300/= at or immediately after time of such robbery wounded the said Emmily Akinyi.
2. After full trial all the three accused persons were found guilty of Robbery with Violence, convicted and sentenced to suffer death, save for the third accused, who was a minor, was placed on probation for three years.
3. The 1st accused, preferred this appeal and filed his appeal through the firm of M/s. Wanyama & Co. Advocates setting out 5 grounds of appeal thus:-

   (a) The learned Magistrate erred in law and fact by convicting the appellant on a charged of robbery with violence without satisfying herself that there was proper identification which was free from any error.

   (b) The learned Magistrate erred in law and fact by convicting the appellant on the basis of accomplice evidence without satisfying herself of corroboration in material particulars by adequate independent evidence.

   (c) The learned Magistrate erred in law and fact by convicting the appellant on the basis of facts and evidence that did not support the charge of robbery with violence

   (d) The learned Magistrate erred in law and fact be failing to find that the Ksh.1000/= allegedly recovered from the appellant as part of the items considered as robbed actually

constituted the appellant's money that had not been proved to be in the exclusive possession of the complainant.

(e) The learned Magistrate erred in law and fact by handing down a sentence that was harsh and excessive.

4. The Appellant was represented by Mr. Wanyama learned Advocate whereas Mr. E. Ombati, Learned State Counsel appeared for State.
5. I have carefully considered the Appellant's appeal, and submissions relied upon by both sides in support of their rival positions.
6. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** where the Court set out *the duties of a first appellate court thus:-*

   "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, See Peters V. Sunday Post, (1958) E.A. 434)"

7. I am not going to reproduce the prosecution's evidence as the same is contained in the record of appeal and the same can easily be accessed if need be, I shall however summarize the prosecution case and the defence.
8. The facts of the prosecution case are that PW1 Emily Akinyi Odwaro was on 25.5.2014 escorting her sister Diana at around 11.20 p.m. to her home at night. That on their way they met a group of youths who hit her sister, who was behind her and the youth ran into a nearby home. PW1 who was new in the area was unable to identify the attackers as they beat her up, stealing her mobile phone, Ksh.1000/= and her sweater. That after the attack PW1 returned back home where the funeral was while bleeding. The matter was reported at Ugunja Police Station. PW4 recorded witnesses statements and issued a P3 form which was filled at Ambira sub-district hospital. PW1 reported that she had been robbed of her phone, Techno T6 115 plus Ksh.1000/= and a white sweater. PW4 arrested the suspects, Haggai and Collins Ochieng who volunteered to give them information, and who gave the names of Okoth, Otieno Madara and Michael Owino Silvester. The appellant was subsequently arrested on 26.6.2014 and Ksh.1000/= recovered. That they went to 2nd accused house and recovered a washed white sweater from a drying line. They also recovered two sim cards from the 2nd accused. PW1 identified the sweater and sim cards and he informed them the 3rd accused had gone with the phone to Port Victoria, where he had hidden the phone. They proceeded to Port Victoria and recovered the phone which PW1 identified as hers. PW4 then charged the three with the offences before court. The recovered items were produced as exhibits.
9. The appellant's Counsel contends that the trial court erred in convicting and sentencing the appellant with an offence of **Robbery with Violence** without satisfying itself that there was proper identification which was free from any error. He urged before conviction, the identification must be watertight and there should be no room left out for any other probabilities. The State on their part urged that the appellant was properly identified and correctly convicted.
10. Regarding identification I am guided by the case of **Paul Etole and Another V. Republic CA 24 of 2000 (UR) Pg. 2 and 3** thus:-

   "The prosecution case against the second appellant was presented as one of recognition or

visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made."

11. The appellant's counsel relied on the case of **Antony Mwende Andrew VR HCRA No. 25 of 2004 (Meru)** where the learned Judges Stated:

    "Our collective view is that there is merit in the argument that the identification and recognition of the Appellant was not without blemish and we cannot rely on it to sustain the conviction on a serious charge."

    and also in the case of **R V Eria Sebwato (1960) E.A. 174** where the Court held:-

    "Where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction."

12. The Learned State Counsel in supporting the conviction referred to the case of **Mohamed Ali V R (2013) eKLR** where my brother Justice M. Muya quoted with approval from the case of **Maitonyi V Republic (1986) KLR** where the Court of Appeal held that:

    "In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity. We are satisfied that notwithstanding the fact that identification was by a single witness our view is that the identification was watertight."

13. I have very carefully examined the evidence of identification adduced by the prosecution witnesses. PW1 the complainant testified that she was new in the area and she was unable to identify any of the attackers. PW2 did not similarly identify the attackers but stated Haggai identified them. The purported identification of the attackers by Haggai (PW3) I have noted was not elaborate as PW1 and PW2 never in their evidence mentioned being in company of Haggai (PW3) or any other person. PW2 strangely stated she was identified by Okoth. She did not say how Okoth was able to identify her during the fateful night and who Okoth was. It should be noted that in North Nyanza Region the name "**Okoth**" is a common name and that "**Okoth**" could be anybody other than the appellant whose last name is "**Okoth**". PW1 and PW2 did not state they knew the appellant before the incident. PW3 testified that on the fateful night Okoth and Collins were at the house where funeral was going on and wanted to dance with a certain lady but she refused. People told Okoth and his group to stop their interference with the dance and they left. He testified the two later attacked their cousins using rungu and a metal bar. He saw Okoth hit the lady. PW3 evidence contradicts evidence of PW1 and PW2, as none of them stated they were with PW3. None of them mentioned the attackers being armed with rungus and metal bar in their evidence in chief. The attack took place at night and PW1, PW2 and PW3 in their evidence in chief did not state what light enable them to see and identify the attackers during a dark night. PW3 did not specifically testify how long the attack took under his observation, at what distance, in what light, how the attackers were dressed, whether they talked to them and what they said and whether he recognized their voices.
14. In the case of **R -V- Turnbull (1976) 3 AII ER 549,** Lord Widgery C.J**.** had this to say:-

    "First, wherever the case against an accused depends wholly or substantially on the

correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?............

Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

15. In the initial report to the police PW1 and PW2 did not give the names of their attackers or their description nor did they say that they were attacked by person or persons who they knew or could ordinarily be found at a particular place (see **Charles Gitonga Stephen V R eKLR 2006**)
16. In the instant case I am satisfied that the conditions were not favourable for positive identification of the attackers, that the prosecution case was not watertight to justify conviction and the court was in error in convicting and sentencing of the appellant in absence of sufficient evidence on identification of the appellant. This court finds that the prosecution failed to put forward sufficient evidence that could be the basis for convicting the appellant with a serious charge it is against the administration of justice to convict on mere allegation and suspicion of an accused person.
17. The appellant contends the trial court was in error in convicting the appellant on evidence of an accomplice without satisfying itself on corroboration on material particulars by adequate independent evidence. PW4 testified that the prosecution relied on evidence of PW3 who was a suspect and who volunteered to give information against the attackers. That the trial court never warned itself on evidence of PW3.
18. In the case of **Mwangi V R 1984 (KLR) 595** the Court of Appeal held thus:-

"The trial magistrate should have treated the evidence of Muthoni as that of an accomplice and it had been a serious misdirection to treat her evidence as that of a reliable witness. Muthoni's evidence should have been held to be untrustworthy for the reason that she was likely to swear falsely in order to shift blame form herself and being a participation of the crime, she could easily disregard the sanctity of the oath to tell the truth."

19. In the cased of **Nguku V R (1985) KLR 412** the Court of Appeal held thus:-

In dealing with the evidence of an accomplice, trial court should first establish whether the accomplice is a credible witness and then look for some independent evidence as corroboration connecting the accused person with the offence. In this case, the evidence of the complainant, who was a statutory accomplice, had been sufficiently corroborated."

20. The evidence of an accomplice should be handled with a lot of caution. The Court before relying on it must warn itself and proceed to establish whether the accomplice is a credible witness and then look for some other independent evidence as corroboration connecting the accused person with the offence. In the instant case the trial court did not warn itself nor did it proceed to establish whether an accomplice was credible witness. The trial court did not treat the evidence tendered by PW3 as evidence of an accomplice which failure was a serious misdirection by treating the evidence as evidence of a reliable witness. Evidence of PW3 should in view o f the above been treated and held to be of an untrustworthy witness for reason that he was likely to give evidence exonerating himself and giving evidence against the accused persons, thus shifting the burden from himself as being a participant of the crime and blaming the accused and as such

disregarding the sanctity of the oaths to tell nothing but the truth. The trial Magistrate's proceedings, and judgment is scanty and it is worthy noting that the trial court did not comply with **Section 169 of the C.P.C**. which failure is the reason, I believe, is the reason for court's failure to warn itself on how it was supposed to handle the evidence of PW3 being an accomplice. Had the trial court warned itself on how to treat the evidence of an accomplice it would have found the evidence of PW3, being an accomplice, needed corroboration from an independent witness and in absence of such corroboration, the same could not be used as a basis to found a conviction.

21. The appellant contends the trial magistrate erred in law in failing to find that the Ksh.1000/= allegedly recovered from the appellant as part of the items considered as robbed actually constituted the appellant's money and that it had not been proved to be in exclusive possession of the complainant. PW1 in her evidence testified that amongst items she was robbed included Ksh.1000/=. PW4 testified that upon arresting the appellant they found him with Kshs.1000/= which he produced as exhibit P5. The Appellant testified that when he was arrested he was found with Ksh.10,000/= which police took, and retained the Ksh.1000/=. The trial court in its judgment did not address itself on the ownership and identification of the recovered exhibits which included Ksh.1000/= recovered from the Appellant. The trial court should have done so to establish the ingredients of the offence of robbery with violence as the prosecution is required to proof amongst other ingredients of the offence of robbery, that something was stolen from the complainant and the recovered items identified as property of the complainant.

22. There is evidence from PW1 that Ksh.1000/= was stolen from her at the time of the robbery with violence, that PW4 recovered Ksh.1000/= from the appellant. Appellant in his defence testified that during his arrest Ksh.10,000/= was recovered from him, but PW4 remained with Ksh.1000/= which PW4 produced as exhibit P5. PW1 did not identify the said Ksh.1000/= note as the same Ksh,.1000/= that was robbed by the attackers. According to the Appellant PW4 took from the appellant Ksh.10,000/= remaining with Ksh.1000/=, the prosecution did not challenge the appellant's evidence nor did it in its evidence state why out of Ksh.10,000/= PW4 picked one Ksh.1000/= note and what identification mark it had to be taken, as the Ksh.1000/= note robbed PW1 and how it connected the appellant with the offence.

23. In the case of **Dedan Kimathi & Another V. R. (2015) eKLR** the Court of Appeal stated as follows:-

> ***"It was incumbent upon the prosecution to prove that the maize which was found in the appellants' possession belonged to the complainant Maize is a staple food in most households and as such it is readily available. In our view the prosecution did not prove that the maize found in the appellants' possession actually belonged to the complainant. Consequently, we find that the circumstantial evidence before the trial court was not sufficient to warrant the conviction of the appellants."***

24. In the instant case the prosecution was under an obligation to prove beyond reasonable doubt that Ksh.1000/= note amongst Ksh.10,000/= found in the appellant's possession was the note robbed PW1, and it belonged to the complainant. Kenya shillings 1000/= note is a legal tender in Kenya and is readily available and found with almost anyone in this country. All Ksh.1000/= notes are similar and easily exchangeable as a commodity of transaction in this country. It is my finding that the prosecution did not prove that the Ksh.1000/= note that was found in possession of the appellant actually was the Ksh.1000/= note robbed, actually belonged to the complainant, consequently I find and hold that the prosecution evidence before the trial court was not sufficient to warrant the conviction of the appellant.

25. **In view of the foregoing I find that this appeal has merits and is hereby allowed. Accordingly I quash the conviction and set aside the sentence meted out against the appellant. I direct that the appellant be hereby set at liberty unless otherwise lawfully held.**

DATED AT SIAYA THIS 8TH DAY OF JULY, 2016

J. A. MAKAU

JUDGE

Delivered in Open Court in the Presence of:

Mr. Wanyama for the Appellant.

M/s. E. Ombati for the State.

Appellant Present.

C.C. 1.   Kevin Odhiambo.

2. Mohammed Akideh.

J. A. MAKAU

JUDGE